STATEMENT BY

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ON

STREAMLINING EMPLOYEE APPEALS

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Mr. Chairman and members of the Subcommittee, my name is John Gage and I am the National President of the American Federation of Government Employees, AFL-CIO. On behalf of the 600,000 employees represented by AFGE, I want to thank you for the opportunity to submit our views on the issue of streamlining employee appeals.

It seems to me that any employee-oriented organization, regardless of its particular constituency, would be supportive of the broad, general goal of streamlining employee appeals. This is particularly true in the federal sector, where the fired employee is off the payroll and out the door and the suspended employee serves the suspension long before the appeals procedures run their course. In this context, it is in the employee's interest to have a fair, straightforward, and expeditious appeal process that does not consume the employee and his or her limited resources in years of expensive litigation. Streamlining the employee appeals processes is a laudable goal for the subcommittee.

Of course, the devil is in the details. For example, there have been many proposals over the years to merge the Merit Systems Protection Board (MSPB) and Federal Labor Relations Authority (FLRA), the Federal Service Impasses Panel (FSIP), the Office of Personnel Management (OPM), the federal sector functions of the Equal Employment Opportunity Commission (EEOC), and certain functions of the Office of Special Counsel (OSC).

Others have proposed eliminating EEOC hearings and/or arbitrations for federal employees altogether, placing all such matters in the federal courts, or even creating a special federal court to hear issues involving federal employees, as now proposed by the Senior Executives Association.

While we admit there is room for some improvement in the present system, AFGE does not support the proposed merger of the MSPB, EEOC, FLRA, OPM

and OSC into a single “superagency” nor can we support limiting the civil rights of federal employees by taking away BOTH their right to an EEOC hearing and their right to redress discrimination in federal court, as well as their right to submit grievances to a neutral, independent arbitrator. The fact is that for the last 25 years, since the passage of the Civil Service Reform Act (CSRA) and the establishment of the federal employee appeals system, there has been a clear, significant, and valid jurisdictional distinction between the cases heard by these five agencies. The MSPB hears individual employee appeals from agency personnel actions. Employees have the right to appeal to the Board if they are removed, demoted or suspended for misconduct or poor performance, subject to certain Reductions in Force (RIF) actions, or denied retirement or certain insurance benefits. The EEOC hears only cases involving discrimination on the basis of race, color, sex, national origin, religion, age or handicap. OPM is responsible for a number of administrative functions, including retirement and benefits decisions and classification appeals, while OSC investigates and sometimes enforces whistleblower cases, Uniformed Services, Hatch Act, and other very specialized cases.

In contrast, the FLRA, unlike these other agencies, is not a "personnel" agency. The FLRA handles representation issues and labor-management disputes between agencies and unions (and between unions and employees, or other unions), not disputes between employees and their employing agencies. Like the National Labor Relations Board in the private sector, the FLRA has specialized expertise in complex bargaining issues, unit representation issues, negotiations, labor unions, review of arbitration awards, and cooperative labor-relations programs. No other federal agency has the experience or capacity to handle such labor-management matters.

The solution to the problems identified in the government's employee appeals processes is not to merge these five highly dissimilar agencies into a single "super-agency." Nor is it to make federal employees second-class citizens by removing their rights to bring disputes to a neutral arbitrator, a proposal that would result in huge increases in the filing of cases in the federal courts.

Instead, the real challenge is to cut down on the number of multiple forums or steps that employees can or, in some cases must, avail themselves of in attempting to process a single appeal to finality, especially the dreaded "mixed case." The simultaneous and overlapping jurisdiction of the EEOC and MSPB creates a situation where multiple steps are required to process some appeals.

For example, in a "mixed" case -- by definition, an appeal of an adverse action (or serious discipline) coupled with a claim that the agency action was motivated by discrimination -- an employee can file either an EEO charge, an MSPB appeal, or if he or she is a member of a recognized bargaining unit, a grievance under the negotiated procedure. The problem, as we see it, occurs after the original forum issues its decision. Rather than being "bound" by a final decision of the selected administrative tribunal, dissatisfied employees may "bounce" over to other administrative tribunals for seemingly endless appeals.

Thus, when critics complain about the confusing and circuitous path that an employee appeal can take as it winds its way to a final decision, and the lengthy time such appeals may take, they are normally addressing an appeal grounded at least in part in a discrimination defense. With respect to all other employee appeals, at least those brought by bargaining unit employees under their collective bargaining agreement, even the Courts have recognized that "[t]he negotiated grievance procedure is much simpler." AFGE Local 2052 v. Reno, 992 F.2d 331, 333 (D.C. Cir. 1993).

Under the CSRA, the negotiated grievance procedure prescribed in a collective bargaining agreement is generally the exclusive procedure for any bargaining unit federal employee to resolve a grievance. 5 U.S.C. § 7121(a). Exceptions to this general rule, however, do exist, such as cases involving separate statutory rights such as the right to be free of employment discrimination and the right to be free of "prohibited personnel practices," such as retaliation, favoritism, and cronyism. Cases presenting both kinds of allegations are commonly called "mixed" cases.

Most federal employees have three alternative avenues for pursuing claims of unfair or illegal treatment in the workplace. However, they cannot complain about the same issue both through the grievance process and in a statutory process such as the EEO or MSPB -- electing one forum operates as a waiver of the other. 5 U.S.C. § 7121(d); 29 C.F.R. 1614.301(a).

1. *Grievance/arbitration:* First, 5 U.S.C. Section 7121 requires that all collective bargaining agreements must contain negotiated grievance procedures providing for binding arbitration of matters raised therein. A typical collective bargaining agreement defines a grievance as "a complaint . . . concerning his or her conditions of employment," and may assert a violation of the contract itself or of "any law, rule or regulation affecting conditions of employment." Many contracts also contain broad Equal Employment Opportunity obligations which prohibit discrimination on the basis of age, sex, race, religion, physical handicap, color or national origin. In such cases, a claim of illegal action or discrimination can be filed as a grievance (by either the employee or by the Union) and resolved by an arbitrator.

Normally, the arbitrator's decision is final and binding, and the case will end there. A grievant cannot also challenge the same incident before the EEOC or MSPB after choosing to proceed under the grievance procedure. However, he or

she retains the right to request review of the arbitrator's final decision from either the EEOC or the MSPB, if the actions could have been filed with that agency in the first instance. See 5 U.S.C. § 7121(d) ("mixed cases"), (e) (adverse actions), (f) (other prohibited personnel practices, whistleblowing).

2. *EEOC route*: In the alternative (but not at the same time), the employee also has a right to file a complaint with his or her agency and then seek a hearing before the EEOC, as set forth in 42 U.S.C. Sec. 2000e-16 and 29 C.F.R.1614, with or without Union assistance. In brief, an employee choosing this route must first seek "EEO counseling" within 45 days of the allegedly discriminatory event, then normally must file a "formal complaint" within 15 days after the end of the counseling period, after which the agency must investigate. After waiting at least six months, the employee may request a hearing before an EEOC administrative judge, after which the judge will issue a tentative decision, which the agency can accept or appeal.

The employee may also choose to appeal an adverse decision in one of two ways – either an appeal to the EEOC's Office of Federal Operations, which acts as an appellate review body, or she may bypass further administrative procedures and seek *de novo* review by filing a lawsuit in district court. 42 U.S.C. § 20003-16(c); 29 C.F.R. § 1614.401**.** The EEOC process was improved and simplified in 1999, so that an Administrative Judge may now award compensatory damages in addition to back pay, front pay, reinstatement and other "appropriate remedies," even if the plaintiff chooses not to file in court.[1]

[1] *West v. Gibson*, 527 U.S. 212; 119 S. Ct. 1906; 144 L. Ed. 2d 196 (1999). Before passage of the 1991 Civil Rights Act, private and federal employees' compensatory damages for Title VII, the ADA and Rehabilitation Act violations were limited to back pay. The CRA expanded these damages to include full compensatory damages, including pain and suffering, for both federal and private plaintiffs. Revisions to the federal sector appeals process in 1999 also improved case processing times and efficiency and encouraged settlement.

3. *MSPB route*: The third venue for federal employees to raise claims of unfair treatment, retaliation and/or discrimination claims is as a challenge to an adverse action such as a suspension, reduction in grade, or removal with the Merit Systems Protection Board. If the employee asserts that the action was taken as a result of discrimination, the case is treated as a "mixed case." See 5 U.S.C. § 4303 (performance-based actions), 5 U.S.C. § 7512 (actions to promote the efficiency of the service); 5 U.S.C. § 7701 (MSPB jurisdiction). As with the EEOC procedures described above, an employee may challenge such an action through the grievance procedure instead of appealing to the MSPB, but may not do both. 5 C.F.R. 1201.3 (c).

The MIXED CASE PROBLEM

Most of the time, the employee must make a binding choice and can only file one case, in one forum. In other words, they can file "under the statutory procedure or the negotiated procedure but not both." 5 U.S.C. § 7121(d). However, arbitration of discrimination cases and "mixed cases" present additional hurdles.

Discrimination Arbitrations

For example, if the employee selects the grievance/arbitration route for a case which includes a claim of discrimination, his or her appeal route case differs. Rather than proceeding directly into court, the employee must exhaust another administrative appeal by proceeding first to the EEOC, then to court. The absurdity of requiring an employee to file a costly and duplicative administrative appeal with the EEOC from an arbitration decision prior to proceeding with *de novo* judicial review was the subject of a court case in Johnson v. Peterson, 996 F.2d 397 (D.C. Cir. 1993).

In Johnson, AFGE argued that the passage of the CSRA was intended to streamline the many various administrative appeals. However, the U.S. Attorney's

Office was able to convince the U.S. Court of Appeals for the D.C. Circuit that Congress intended to require employees to exhaust an EEOC appeal after completing their arbitration case, and before proceeding to court. Johnson, 996 F.2d at 399-400, citing 5 U.S.C. § 7121(d).

Mixed Cases

For a "mixed case" (appeals of removals or suspensions greater than 14 days coupled with a claim of discrimination), the CSRA establishes a special, even more complex procedure. See 5 U.S.C. § 7702(a)(1). As noted above, the aggrieved employee must make an initial, binding choice. He may seek relief either under a statutory procedure (MSPB or EEOC) or under the negotiated grievance procedure, but not under both. 5 U.S.C. § 7121(d).

Under the statutory procedure, the employee may first raise the complaint with his employing agency which has 120 days to reach a decision. 5 U.S.C. § 7702(a)(2). If the agency decides against the employee, the employee may either appeal to the MSPB or seek direct judicial review. 5 U.S.C. § 7702(a). If an employee appeals to the MSPB, it must reach a decision within 120 days, at the end of which period the employee may either proceed directly to court or seek further administrative review. 5 U.S.C. § 7702(a)(3). An employee who wishes to follow the administrative route may appeal the MSPB's decision to the EEOC which, under the statute, has 30 days to decide whether to hear the case. 5 U.S.C. § 7702(b)(1).

If the EEOC rejects the case or if it accepts the case and agrees with the MSPB's decision, the employee may then proceed to court. 5 U.S.C. § 7702(b)(5)(A). If the EEOC accepts the case but disagrees with the MSPB, however, it must remand the case to the MSPB for further consideration. 5 U.S.C. §§ 7702(b)(3)(B), (b)(5)(B). Upon reconsidering the case, the MSPB issues an opinion that either agrees with the EEOC or rejects the EEOC's findings. If the

MSPB agrees with the EEOC, the employee may seek judicial review. 5 U.S.C. § 7702(c). If the MSPB rejects the EEOC's findings, however, the statute calls for the creation of a special panel to make a final decision. 5 U.S.C. § 7702(d)(1). The special panel's final decision is then subject to judicial review. 5 U.S.C. § 7702(d)(2)(A).

Such a tortuous path is both bizarre and inefficient, and benefits neither the employee nor the agency. Nevertheless, in AFGE Local 2052 v. Reno, 992 F.2d 331, 333 (D.C. Cir. 1993), which involved a "mixed case" brought under the negotiated grievance procedure and heard by an arbitrator, the U.S. Attorney's Office was once again able to convince the U.S. Court of Appeals for the D.C. Circuit, over AFGE's strenuous objections, that such an appellant had to file a costly and duplicative administrative appeal, this time with the MSPB, prior to seeking judicial review. In particular, the Court criticizes "the complex yet ultimately ascertainable procedural scheme that emerges from the language of the CSRA," and notes that there are six different administrative stages prior to a final decision in the processing of a mixed case that provide employees with an opportunity to go directly to court with their appeal. AFGE Local 2052, 992 F.2d at 336. In the end, this case made it more difficult for employees to navigate the system, over this Union's objection and at the Government's successful urging.

To rectify these extraordinary delays and procedural confusion which characterize the processing of mixed cases, AFGE has supported a number of reforms and improvements.

First, we have recently testified before the EEOC regarding its proposed “field restructuring plan,” in which the agency plans to spend substantial sums of money to downgrade certain offices and reduce its case-handling staff, while refusing to fill attorney and support positions, and contracting out jobs to a privatized call center. The plan greatly expands territories to be served by each

office, but does not call for hiring staff to handle the expanded coverage or for addressing the EEOC's drop-off in enforcement of discrimination cases. EEOC says the plan will save money, but it will instead result in short-staffing and increases in case backlogs and delays. AFGE recommends that the EEOC be fully funded, so that employees can count on a meaningful forum to eliminate and eradicate discrimination in their workplaces.

Second, AFGE has supported proposals which would simplify the federal appeals process by permitting employees to choose the forum they prefer (MSPB, EEOC, or arbitration) to decide all issues in accordance with established case law. The hopelessly complex and lengthy appeal routes of our current system, which splits jurisdiction and requires overlapping review, was rooted in an uncertainty over how well the newly created EEOC and MSPB would do their jobs, and a fear of conflicting decisions. Fortunately, these concerns have proven to be largely misplaced. Experience has shown that employees may properly select a single, appropriate forum in which to pursue their discrimination claims for a particular case, and bring to an end the labyrinthine process that currently exists.

Finally, AFGE has worked with both the Department of Homeland Security and the Department of Defense, in developing and fine-tuning speedy, simplified procedures for employee appeals, which preserve due process and fairness, while preserving the ability of the employee to seek review from an independent third party, such as an arbitrator or an MSPB or EEOC Administrative Judge. It is absolutely critical that any such system remain fair and independent, both in perception and in reality, so that it may continue to serve the essential purpose of safeguarding and protecting the merit system from discrimination and abuse, and so that it retains the trust and confidence of employees, managers and agencies and unions alike.

Mr. Chairman, let me conclude my remarks by emphasizing that the Committee needs to redirect its streamlining efforts: (1) away from the proposals to consolidate agencies like the MSPB, EEOC, FLRA, OPM and OSC -- five agencies which function well, have little or no overlap of jurisdiction and who carry out wholly separate statutory missions; and (2) toward the heart of the confusion -- the overlapping jurisdiction of the MSPB and EEOC, where simple discrimination cases can languish for years, and where employees are forced to file numerous appeals of the same case. Once an employee and an agency get wrapped up in a mixed case, it may be years before they see the light of day. Mixed cases are the black holes of employee appeals. The federal courts and arbitration systems, by contrast, are functioning well and do not require intervention by this Committee at this time. In particular, there is no need to create a system which deprives federal employees of their fundamental civil right to challenge discriminatory employment decisions, while permitting private sector and other public sector employees to file cases in federal courts, state courts, and before state administrative agencies, as they can do now.

Instead, a better step in the right direction would be to revisit the Court's decisions in Johnson and AFGE Local 2052 and expressly eliminate any layer of cross-appeal that requires employees to appeal adverse arbitration decisions to the EEOC or MSPB prior to seeking what is, in any event, a *de novo* judicial review. Similarly, employees who elect to file cases with MSPB or EEOC, instead of filing grievances should expect finality in their administrative appeals, while retaining the right to seek *de novo* judicial review in appropriate cases.